



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL'S MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO. 146 OF 2020

BETH MWANZA NZIOKA.....PLAINTIFF

VERSUS

MUTUKU MUTUNGI..... DEFENDANT

JUDGMENT

BACKGROUND

Society is governed by law. In most cases, people are mindful of the secular and divine laws. Divine law is to be found in the Holy Scriptures. Both laws pay homage to the inherent dignity of human nature. There are several religious texts which frown upon the act of ruining the reputation of others. For instance, the Holy Bible contains the following verses:

In the book of James Chapter 4 verse 11, it is stated thus:

"Speak not evil one of another, brethren. He that speaketh evil of his brother, and judgeth his brother, speaketh evil of the law, and judgeth the law: but if thou judge the law, thou art not a doer of the law, but a judge."(King James Version).

In the book of Mathew Chapter 12 verse 36, it is said that:

"But I tell you that every careless word that people speak, they shall give an accounting for it in the Day of Judgment."

In the book of Leviticus Chapter 19 verse 16, it is provided that:

"You shall not go about as a slanderer among your people, and you are not to act against the life of your neighbour; I am the LORD."

The Holy Qur'an contains the following verses:

Al-Noor Chapter 24 verse 15

"Behold, you received it on your tongues, and said out of your mouths things which you had no knowledge; and you thought it to be a light matter, while it was most serious in the sight of God."

Al-Isra Chapter 17 verse 53

"Say to My servants that they should only say those things that are best, for Satan does sow dissensions among them, for Satan is to man an avowed enemy."

Al-Noor Chapter 24 verse 23

"Verily, those who accuse chaste women, who never even think of anything touching their chastity and are good believers — are cursed in this life and in the Hereafter, and for them will be a great torment."

William Shakespeare once retorted:

"Good name in man and woman, is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands. But he that filches from me my good name robs me of that which not enriches him and makes me poor indeed." (Othello Act 3 Scene 3,155-161).

Article 28 of the Constitution of Kenya provides that:

"Every person has inherent dignity and the right to have that dignity respected and protected".

Article 32(1) of the same Constitution provides that every person has the right to freedom of conscience, religion, thought, belief and opinion whereas Article 33(1) provides that every person has the right to freedom of expression. The constitutional underpinning of the law of defamation is to be found in Article 33(3) of the Constitution which provides as thus:

"In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others".

There is also the Defamation Act Chapter 36 Laws of Kenya which proscribes acts of defamation. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his credit, and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The cause of an action in defamation exists to provide some recourse and remedy to victims of falsehoods which can and do cause injury to reputation.

THE CLAIM

Beth Mwanzia Nzioka (hereinafter referred to as the plaintiff) filed this suit on 3/7/2020 vide a plaint dated 1/7/2020. She sued (hereinafter referred to as the defendant) on account of an alleged act of defamation vide utterances allegedly made by the defendant on 22/4/2020 and 13/5/2020. According to the plaintiff, the first utterances were made at the Chief's office, Mulili. The plaintiff averred that the words were uttered in the Kikamba language and the English rendition thereof was:

"You have bewitched my mother and died and took textbooks of my son who dropped out of school".

That on 13/5/2020 while at the plaintiff's home at Ikungu in the presence of elders, the defendant stated:

"You gave my mother food and died. You are a witch".

The plaintiff averred that the said words in their natural and ordinary meaning and by innuendo meant and were understood to mean that:

- a) The plaintiff is not Christian, she is a witch and cannot be trusted because she causes suffering to people;
- b) The plaintiff is an unfit person whom the society should not associate themselves with;
- c) The plaintiff should be shunned and avoided.

The plaintiff further averred that the said words were actuated by malice and ill will was demonstrated by:

- i. The defendant used harsh and violent words;
- ii. The defendant uttered these words in the presence of council of elders and clan elders to ensure that the same were widely circulated;
- iii. Despite the demand for apology, the defendant has declined to do so.

That the plaintiff is a married woman and church going person and as a result of the defendant's actions, the plaintiff's character and reputation were injured severely before the eyes of right thinking members of the society. The plaintiff was shunned and thus suffered great loss and damage for which she holds the defendant liable.

The plaintiff thus seeks the following reliefs:

- a) General damages for defamation;
- b) Costs of and interest; the suit;
- c) Any other relief that this court may deem fit and just to grant.

THE DEFENCE AND COUNTER-CLAIM

The defendant filed a statement of defence and counter-claim on 1/2/2022 after the *ex parte* judgment was set aside. The defendant denied that he went to the Chief's office on 22/4/2020, denied uttering the alleged defamatory words, denied visiting the plaintiff's home on 13/5/2020 and denied uttering any defamatory words in the presence of clan elders. The defendant averred that there were previous disputes between him and the plaintiff where the plaintiff destroyed the defendant's pasture and part of the boundary between them and erected a gate and during the dispute, the plaintiff called the defendant a prostitute.

In the counter-claim, the defendant averred that during the boundary dispute while at the site of the damage, the plaintiff uttered words to the effect that she did not want to talk to a prostitute like the defendant. That the said words were uttered in the presence of the defendant's wife and two other neighbours. The defendant further averred that the said words meant that the defendant was:

- 1) Unfaithful;
- 2) A womanizer;
- 3) A sex worker.

That as a result of the said words, the defendant's wife left the matrimonial home stating that she could not live with an unfaithful husband or a man who does sex in exchange for money. That it took the defendant several months to bring his wife back home but their relationship was greatly damaged as the wife no longer trusts him. The defendant thus prayed for:

- a) The plaintiff's suit be dismissed with costs;
- b) General damages for defamation;
- c) Damages in lieu of an apology;
- d) Costs and interest at court rates.

DEFENCE TO COUNTER-CLAIM

In her defence to the counter-claim, the plaintiff reiterated the contents of her plaint and denied having uttered the words complained of by the defendant. The plaintiff denied the contents of the counter-claim and urged the court to dismiss the counter-claim with costs and enter judgment in her favour.

THE EVIDENCE

The Plaintiff's Case

The plaintiff testified and called one other witness in support of her case. She adopted her statement filed in court as part of her evidence in-chief. The plaintiff testified that the defendant was her neighbour. That on 22/4/2020 while at the Chief's office in Mulili location, the defendant uttered the following defamatory words in the Kikamba language:

"You have bewitched my mother and died and took textbooks of my son who dropped out of school".

It was the evidence of the plaintiff that on 13 /5/2020 while at the plaintiff's home, and in the presence of elders, the defendant uttered the following words in the Kikamba language:

“You gave my mother food and died, you are a witch”.

That the plaintiff asked the defendant why he was insulting him but the defendant repeated the words. The plaintiff stated that her character and repute was injured as she was a church going person and family woman.

The plaintiff denied having abused the defendant and further denied the existence of a boundary dispute between them. She produced several documents and prayed for compensation as well as costs of the suit. PW 2 Julius Mackmbiti also adopted his statement filed in court as part of his testimony. His testimony was similar to what the plaintiff stated. The witness stated that the words were uttered in the presence of clan elders and that the said words tarnished the plaintiff's name.

The Defendant's Case

The defendant also adopted his statement filed in court as part of his evidence in-chief. He was the only witness who testified in support of his defence and counterclaim. The defendant testified that the plaintiff was his neighbour. He denied having gone to the Chief's office on 22/4/2020 and further denied having uttered the words complained of. The defendant denied visiting the plaintiff's home on 13/5/2020 and further denied having met the clan members in the presence of the plaintiff. It was the defendant's testimony that sometime in May, 2020 the plaintiff cleared a portion of their boundary and when the defendant inquired, the plaintiff stated that she was not willing to talk to a prostitute like the defendant. That the plaintiff uttered the words in the presence of the defendant's wife and two other neighbours, as well as the defendant's son.

The defendant stated that the words uttered by the plaintiff meant that he was unfaithful to his wife, a womanizer and a sex worker. That as a result of the utterances, the defendant's wife left the matrimonial home stating that she could not live with an unfaithful husband or a man who does sex in exchange for money. The defendant stated that it took him a lot of effort to bring back his wife but their relationship was greatly damaged as his wife no longer trusts him. That sometimes she withdraws completely from him and he has had to rely on counselling from their local church Pastor. The defendant further testified that on 9/6/2020 he was summoned by the police at Makindu on allegations that he had

called the plaintiff a fool on phone. The defendant denied having insulted the plaintiff but was advised to apologize. When he did, the plaintiff demanded for Ksh. 100,000/=. The defendant urged the court to dismiss the plaintiff's suit and allow his counter-claim.

FACTS NOT IN DISPUTE

From the evidence of both parties, the following facts are not in dispute:

- a) The plaintiff and defendant are neighbours well known to each other;
- b) The plaintiff and defendant have a long standing dispute between them;
- c) The disputes between the plaintiff and the defendant have been referred to the local authorities on quite a number of occasions;
- d) There is bad blood between the plaintiff and the defendant.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues for determination are as follows:

- i. Whether the defendant defamed the plaintiff as alleged or at all;
- ii. Whether the plaintiff's reputation was ruined by the alleged defamatory words;
- iii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
- iv. Whether the plaintiff defamed the defendant as alleged or at all;
- v. Whether the defendant's reputation was ruined by the alleged defamatory words;
- vi. Whether the defendant is entitled to damages and if so, the nature and quantum thereof;
- vii. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff filed written submissions. In her submissions, the plaintiff relied on the evidence on record and submitted that the words uttered by the defendant meant that the plaintiff was a Witch. It is submitted these imputations are injurious to reputation especially in African customary context and Kamba culture, exposing the plaintiff to hatred, ridicule, and stigmatization. Reputation lowering is illustrated by the fact that the accusations were made publicly before elders. That the words were uttered at the Chief's office and in the

presence of elders at the plaintiff's home. The plaintiff contended that presence of other people confirms publication. The plaintiff further submitted that the words specifically referred to her.

The plaintiff argued that the defendant did not plead nor prove any justification, fair comment or privilege. That the OB extract shows that it was the plaintiff who reported to the police. It was submitted that there was no evidence to show that the defendant's allegations were reported and acted upon by the authorities. The plaintiff relied on the defendant's testimony and submitted that the apology he tendered was an admission of liability. That the defendant failed to call witnesses and as such, the counter-claim must fail. The plaintiff submitted that she was a married woman with children and a church member. That her reputation was lowered in the estimation of the public.

The plaintiff urged the court to award Ksh. 2,000,000/= in general damages, Ksh. 200,000/= as exemplary damages and Ksh. 100,000/= as damages in lieu of an apology. The plaintiff also prayed for costs of the suit. She relied on the authority of ***Ernest Omondi Owino & another v Felix Olick & 2 others [2021] eKLR.***

THE DEFENDANT'S SUBMISSIONS

The defendant also filed written submissions. He submitted that the plaintiff had not proven on a balance of probabilities that the defendant defamed her. That the plaintiff did not produce documents from the Chief nor call him as a witness herein as there is a high probability that the meeting did not take place. The defendant observed that the plaintiff produced two documents from the Chief relating to a different dispute but failed to produce any document from the Chief relating to the alleged meeting that took place on 22/4/2020. The defendant further argued that the plaintiff failed to produce the minutes of the alleged clan meeting that was held on 13/5/2020.

The defendant pointed out that the plaintiff made a contrary report on 9/6/2020 when she visited Makindu police station yet the events of 22/4/2020 and 13/5/2020 were supposed to have been fresh in her mind. That the plaintiff's evidence was full of inconsistencies and untruthfulness. The defendant pointed out what he considered to be the inconsistencies. The defendant argued that the evidence of the plaintiff pointed to mere

abuses allegedly uttered by the defendant but not defamatory words. The defendant contended that the contradictions in the plaintiff's evidence point towards her untruthfulness and go to the substratum of the case. That the plaintiff failed to give the details of the OB report No. 14/9/6/2020 because she knew that it was not favourable to her case.

The defendant submitted that the plaintiff had failed to prove that the words allegedly uttered by the defendant were defamatory and that she suffered damage. That if any words were spoken by the defendant on 22/4/2020, they were made through phone and as such, there was no publication to third parties. The defendant submitted that he was able to prove that the plaintiff defamed him. The defendant urged the court to dismiss the plaintiff's suit and allow his counter-claim with costs. The defendant did not propose on quantum. He relied on several authorities but did not bother to annex any of them.

ANALYSIS AND DETERMINATION

Article 28 of the Constitution of Kenya provides that:

"Every person has inherent dignity and the right to have that dignity respected and protected".

Article 32(1) of the same Constitution provides that every person has the right to freedom of conscience, religion, thought, belief and opinion whereas Article 33(1) provides that every person has the right to freedom of expression. The constitutional underpinning of the law of defamation is to be found in Article 33(3) of the Constitution which provides thus:

"In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others".

What is defamation? The online law dictionary defines defamation as the act of making untrue statements about another which damages his/her reputation. In ***Winfield & Jolowicz on Tort 15th edition***, defamation is defined as:

".....the publication of a statement which reflects on a person's reputation and tends to lower him in the estimate of right thinking members of society generally or tends to make them shun or avoid him..."

In the case of *Alnashir Visram v Standard Limited [2016] eKLR*, the court held as follows:

"Defamation is the publication of a statement which tends to lower a person's reputation or character in the estimation of right thinking members generally and which makes them shun and avoid him. The burden of proof lies on the claimant to establish that the published words or statements as published of and concerning the plaintiff are defamatory of him or her. The claimant must prove, on a balance of probabilities, that the words complained of were published of and concerning him; that they were published by the defendant; that they were false; and that they were defamatory in character of the claimant by tending to lower him in the estimation of right thinking members of the society generally, making them shun or avoid him. Finally, the claimant must prove that the publication was done with malice".

Similarly, in the case of *Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR* the Court of Appeal observed that:

"For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:

- (i) That the matter of which the plaintiff complains is defamatory in character.***
- (ii) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.***
- (iii) That it was published maliciously."***

In view of the foregoing, for the tort of defamation by way of slander as is in this case to succeed, the following elements must be proved by the claimant:

- 1) The published words referred to the claimant i.e. identify him;
- 2) The statement as published was false and defamatory of the plaintiff;
- 3) The statement was published by the defendant i.e. communicated to at least one person other than the claimant. See *Winfield and Jolowicz on Tort: 16th Edition 2002* pp 159 and 162;
- 4) That the publication was malicious.

One question with which courts have struggled is how to determine which standard should govern whether a statement is defamatory. A statement may be viewed as defamatory by some individuals, but the same statement may not be viewed as defamatory by others. Generally, courts require a plaintiff to prove that he or she has been defamed in the eyes of the community or within a defined group within the community. *Halsbury's Laws of England 4th Edition Volume 28* at Page 23 states that:

"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense".

In determining the meaning of words for purposes of defamation the court does not employ legal construction, it will consider the layman's understanding of the same. Lord Atkin in the case of *Sim v Stretch [1936] 2 All ER 1237* observed that the test in determining whether words are defamatory is whether the words tend to lower the plaintiff in the estimation of right thinking members of society generally. If the answer is in the affirmative then the words are termed as defamatory. A publication is considered to be defamatory of a person's character and reputation if it conveys a meaning which is likely to either lower the persons' reputation in the eyes of ordinary reasonable members of the community; lead those people to ridicule, avoid or shun or despise the person; or injure the person's reputation in business, trade or their profession.

It is worth noting that the meaning behind the publication can be implied or express. It all depends on the context and circumstances of each case. Thus, defamation may arise from the direct meaning of words used when taken on the face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement. It is also irrelevant whether the publisher or author intended to make a defamatory statement of and concerning the plaintiff when he or she published the defamatory words complained of. As already pointed out, the applicable test is an objective test; whether or not the statement is defamatory is judged against contemporary community standards from the stand point of a reasonable person.

I will begin by addressing the plaintiff's claim. There is a dispute as to whether the defendant uttered the defamatory words as alleged by the plaintiff. The plaintiff mentioned two incidents in which the defendant allegedly defamed her. In my view, before considering whether the words were defamatory, the court must be convinced in the first instance, that the words were indeed uttered by the defendant. According to the plaint, the incident of 22/4/2020 occurred at the Chief's office, Mulili location. That on that day, the defendant uttered the following words whose translation in English is:

"You have bewitched my mother and died and took textbooks of my son who dropped out of school".

In her testimony in-chief, the plaintiff stated that PW 2 was present when the words were uttered but it is not clear from her testimony in which incident was PW 2 present. When the plaintiff was cross-examined by counsel for the defendant, she stated that it was the defendant who had caused her to be summoned at the Chief's office and that when she got there, the defendant insulted her. In further cross-examination, the plaintiff stated that the words were uttered in the presence of PW 2. The plaintiff did not testify anywhere in her statement that other than PW 2, there is another person or persons who heard the defendant's alleged utterances.

The testimony of PW 2 indicates that he was present on 22/4/2020 when the words were allegedly uttered by the defendant. In his statement which was adopted as part of his evidence in-chief, the witness indicated that the words were uttered at the Chief's office Mulili but in his testimony in court, he stated that they were uttered at the Chief's office at Kiboko. It is not clear whether Mulili and Kiboko mean the same place. Before delving further into the allegation, there is need to establish whether there was a meeting at the Chief's office on the material day. To begin with, it is not clear from the plaintiff's evidence why the meeting was convened in the first place. The plaintiff testified that it was the defendant who had summoned her but did not explain why. PW 2 did not also state why they were meeting at the Chief's office.

It is common knowledge that when a person is summoned by the Chief in official capacity, there must be a letter to that effect. It is also common knowledge that proceedings at the office of the Chief must be recorded. This is evident from the documents produced by the plaintiff relating to incidents of 2017. The plaintiff did not call the Chief to confirm that

indeed, he had summoned her and also explain why, and further confirm that there was a meeting at the office. No documentary evidence was produced to confirm that there was such a meeting. There is even no evidence from both the plaintiff and PW 2 to show who else attended the meeting as well as the purpose. Furthermore, no context was given to explain the circumstances under which the defendant allegedly uttered the words and what followed thereafter at the meeting. No reasonable narrative was given to lay the basis that prompted the defendant to utter the words. The plaintiff's evidence portrays a picture in which she was just summoned for an unknown reason and when she attended the Chief's office, the defendant just uttered the words and that was it.

The plaintiff alleged that she reported to the police vide OB number 14 of 9/6/2020. She did not produce the OB report. However, the same was produced by the defendant. According to the OB report, the plaintiff reported that the defendant called her on phone on 22/4/2020 and used abusive language against her. That she then involved the area Chief who summoned the defendant whereupon the defendant was asked to apologize but he declined. From the report, it is not clear when the defendant was summoned by the area Chief. The plaintiff did not dispute the OB report although when she was cross-examined, she stated that she was not insulted on phone. The authenticity of the OB report is not in dispute. I have already indicated that the plaintiff has failed to show that there was a meeting at the office of the area Chief on 22/4/2020. On the strength of the OB report, and in the absence of tangible evidence to the contrary, I find that it is highly probable that there was no meeting at the office of the area Chief on 22/4/2020. It is no wonder that both the plaintiff and PW 2 did not even mention the name of the Chief who allegedly convened the meeting.

Without proof of the existence of the meeting at the Chief's office, it would be a tall order to even imagine that any words were uttered by the defendant, let alone defamatory words. As for the alleged incident on 13/5/2020, there is no evidence from the plaintiff to explain why a meeting was convened at her home. According to PW 2, the meeting was to resolve the issue of the defendant's alleged utterances on 22/4/2020. PW 2 stated that he was the Chair of the meeting but did not produce the minutes or any documentary proof that the meeting took place. There is no evidence to show how the parties were summoned or informed of the meeting. Even in their oral testimony, neither the plaintiff nor PW 2

stated how the alleged meeting was convened and what transpired before and after the utterances were allegedly made.

It is alleged that the meeting comprised of elders from different clans. I doubt that such a meeting would be without records. It is the duty of the plaintiff to prove her case against the defendant. The plaintiff's evidence was given so casually. She testified that she was a married woman and church going person. That her character and reputation was injured severely before the eyes of right thinking members of the society and that the plaintiff was shunned. There is no evidence to show that the plaintiff's character and reputation were injured or that she was shunned by right thinking members of the society. It is not about what the plaintiff thinks of her reputation after the alleged defamation but what right thinking members of the society think. There is absolutely nothing to show that the plaintiff was treated differently after the alleged utterances. My finding is that the plaintiff has failed to prove the ingredients of the tort of defamation.

The defendant's counter-claim is in no better position. Only the defendant testified in support of his case. It is not even clear when the words were allegedly uttered by the plaintiff. The defendant alleged that the words were uttered in the presence of his wife, son and two neighbours but none of them was called to testify. The defendant further stated that as a result of the words, his wife left him and that it took him a lot of effort to bring her back. That even after the wife returned, she did not trust him. No evidence to that effect was adduced. The elements of defamation were not satisfied by the defendant. For instance, there is no evidence of publication. Publication certainly includes traditional forms, such as communications included in books, newspapers, and magazines, but it also includes oral remarks in cases of slander. In the context of defamation, publication means that the statement complained of was communicated to another person other than the plaintiff.

The upshot of the above considerations is that both the plaintiff's suit and defendant's counter-claim are for dismissal. The practice of the courts is that even where the court dismisses a claim for general damages, the trial court is obliged to assess the quantum of damages that it would have awarded had the claim been proven. The position has been upheld time and again by the superior courts. For instance, in the case of ***Gladys Wanjiru Njaramba v Globe Pharmacy and another [2014] eKLR***, the court observed that:

“It is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissal of the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa versus Bhogals Garage CA No. 124 of [1993] (UR) Where the court held that the that damages be assessed even if the case is dismissed does not imply writing an alternative judgment.”

The position was affirmed by the Court of Appeal in the case of ***Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR***.

On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:

- 1) Damages should not be inordinately too high or too low;
- 2) Damages should be commensurate to the injury suffered;
- 3) Damages should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered;
- 4) Awards in past decisions are mere guides and each case depends on its own facts.

In the case of ***Nation Newspapers Limited v Chesire [1984] KLR 156***, the Court of Appeal held that in assessing the quantum of damages for defamation, the extent to which the words injured a party's reputation ought to be taken into account. In that case, the court awarded nominal damages as the libel was slight. Bearing the above principles in mind, I find that the slander would have been grave as it imputed murder. However, I take into account the fact that it could have been published to a limited number of people who happened to know the plaintiff. There is no evidence that the slander would be repeated or broadcast further than the limited setting in which it could have been published.

Doing the best I can, I would have assessed general damages at Kshs. 200,000/=. The plaintiff did not plead the other damages indicated in the submissions. I would not have awarded any. I rely on the authority of ***Habil Nanjendo Bushuru v Alex Mutuli [2020] KEHC 6603 (KLR)***, wherein an award of Ksh. 200,000/= was affirmed on appeal. Had the defendant proven his counter-claim, I would have awarded Ksh. 100,000/= as general damages, since the defendant's claim comprised of one incident only. I would not have awarded damages in lieu of an apology because no evidence was led to show that there was any demand for an apology, which the plaintiff declined.

DISPOSITION

In view of the foregoing, I find that both the plaintiff and the defendant have failed to prove their claims on a balance of probabilities. Consequently, both the plaintiff's suit and defendant's counter-claim are hereby dismissed. As both parties have failed in their endeavour's, each party shall bear own costs. I am reminded of the famous quotation by Lord Goddard, C.J. in *Bonham Carter v Hyde Park Hotel Ltd [1948] 64 T.R. 177* wherein he observed thus:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, 'this is what I have lost, I ask you to give me these damages'. They have to prove it."

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 8TH DAY OF
DECEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.